

USPTO Enacts Flat Goal Program; POPA Challenges

The USPTO is launching its flat goal pilot program after mischaracterizing the union's proposals to practically avoid negotiating on the program altogether. POPA has filed a grievance challenging the legality of this program and declaring that the USPTO is committing an unfair labor practice by unilaterally implementing the program without completing collective bargaining.

The flat goal program requires a flat goal of production units per quarter per examiner based on the examiner spending 80 percent of his/her time examining. It also raises the production level required for a fully successful performance rating from 95 percent to 100 percent. Examiners must complete 100 percent of the assigned goal to maintain a fully successful rating. Historically, however, the patent corps averages 70-75 percent examining time, with the remaining time used for training, appeals conferences, interviews, leave time, etc. The USPTO's assumptions of time needed by examiners to perform non-examining functions

were not based on actual examination data. The program makes only limited provisions to deal with sick leave or leave without pay for family or medical reasons and makes no provisions for the use of annual leave carried over from previous years.

The USPTO tried to strong-arm POPA by stating in a Nov. 16 memo to the union:

"Unless you limit your proposals in this bargaining to the procedures and appropriate arrangements in response to management's decision to implement a Flat Goal Pilot by next Wednesday, November 22, 2006, and agree in writing that you will not further claim that the entire topic is permissive, we will conclude that you have no interest in bargaining over these issues and will begin the implementation process for the pilot, based upon our last best offer."

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Inspector General's Witness Intimidation of Examiners

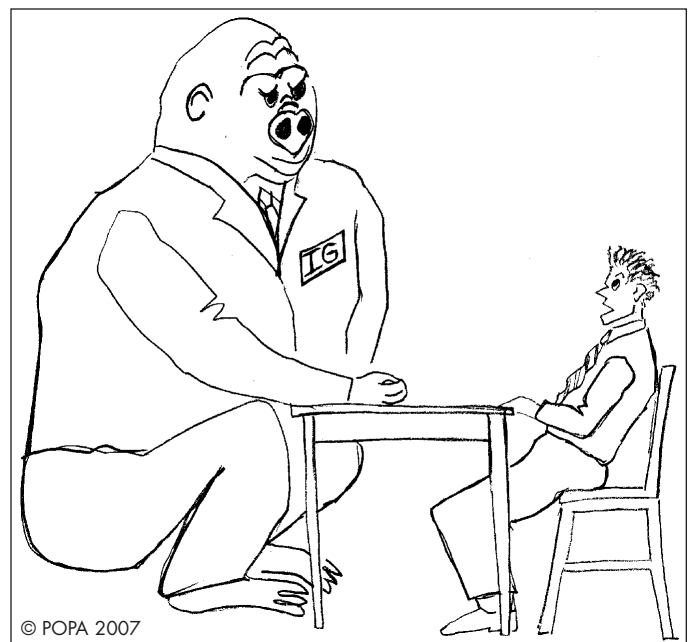
In an apparent case of witness intimidation, an agent from the Department of Commerce Inspector General's Office—with cooperation from the USPTO Office of the General Counsel (OGC)—investigated, questioned and pressured two patent examiners who had been subpoenaed as defense witnesses in the trial of a former employee for time and attendance abuse, but were under no suspicion of wrongdoing themselves. POPA is seeking assurances from the USPTO that it will prevent such workplace intimidation in the future.

In one case, a paralegal in the OGC sent Primary Examiner Manual Mendez an e-mail directing him to a mandatory "interview" with the IG at 11 a.m. that same day. Mendez was on sick leave that morning and didn't come to the office until about 3 p.m., missing the mandatory interview. Upon his arrival at the office, Mendez read the e-mail and replied to the OGC explaining his absence, asking to reschedule, and inquiring about the nature of the interview. Mendez did not receive a reply to his request.

Two business days later, IG Special Agent Rachel Ondrik appeared unannounced at Mendez's USPTO office door. Mendez invited her in. She closed the door, notified Mendez that she was conducting a formal investigation and that he must truthfully answer her questions. She did not notify Mendez of his rights, including his right to have representation present. Her questioning began with a

statement similar to, "You spend a lot of time here, Mr. Mendez." This indicated to Mendez that Ondrik had

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A Typical Inspector General Interview, the 800-Pound Gorilla in the Room

Flat Goal Program

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This appears to be an agency attempt to twist POPA's intent as a way to bulldoze its way into the program without required bargaining.

The agency's program, however, is illegal because statute and case law require that a federal employee's performance appraisal plan "to the maximum extent possible, permit the accurate evaluation of job performance on the basis of objective criteria." 5 U.S.C. § 4302(b)(1).

For years, the current examiner performance appraisal plans have measured examiners' performance in six-minute intervals. The flat goal would no longer account for all the actual duties performed by an examiner and, thus, would not be measuring performance "to the maximum extent feasible."

The flat goal program is also illegal because it denies employees their statutory entitlement to use their accrued sick and annual leave. The flat goal program only accounts for the use of annual leave accrued during a particular quarter. If an employee has accrued leave and desires to take additional leave in a quarter, the examiner would still be responsible for achieving 100 percent of his/her assigned flat goal. This effectively denies the employee the right to use annual leave.

Similarly, an examiner's flat goal would only be adjusted for the use of sick leave if the sick leave becomes "long term." Again, under the agency's flat goal program, examiners are expected to achieve the flat goal even when sick for short periods, effectively denying employees the benefit of sick leave.

POPA will continue to report developments on this program and cautions examiners to thoroughly review the details of the flat goal program before enrolling—this program can be harmful to an examiner's career health. ▽

Numbers Don't Lie

USPTO statistics on examining-time percentages suggest that, if the flat goal program had been enacted in fiscal year 2006, many examiners' performance would have been less than fully successful.

Using FY 2006 production numbers, the agency calculated that, of more than 40 art units in one technology center, only 6 averaged 80 percent or better examining time. Thus, the vast majority of employees in that technology center were averaging less than 80 percent examining time. The benchmark for fully successful performance under the flat goal program, however, is based on the agency's arbitrary determination that an examiner will have 80 percent examining time.

In another technology center of more than 15 art units, not one averaged more than 80 percent examining time in FY 2006.

Using fiscal year 2005 numbers, in a third technology center of more than 30 art units, only one art unit accomplished an 80 percent average examining time.

If the USPTO institutes the flat goal program throughout the examining corps, as it proposes to do in its 2007-2012 Strategic Plan, the numbers indicate that some individuals may meet their goals, but most examiners will fail.

2006 POPA Election Results and 2007 Executive Committee Roster

	Telephone	Art Unit	Office
Union Office	571-272-7161 571-272-7162 571-272-2690	—	RND-1D61 REM-2A48

Officers

President			
Robert D. Budens	571-272-0897	1648	REM-3A35
Vice President			
Lawrence J. Oresky	571-272-6930	3652	KNX-3B11
Secretary			
Howard J. Locker	571-272-0980	1661	REM-2C81
Assistant Secretary			
Pamela R. Schwartz	571-272-1528	1774	REM-10C75
Treasurer			
Randall P. Myers	571-272-7526	2646	KNX-6B81

Chemical Area Delegates

Renee Berry	571-272-1459	1762	REM-8D54
Dr. Kathleen Duda	571-272-1383	1756	REM-9A65
Dr. Patricia Duffy	571-272-0855	1645	REM-3B05
G. R. Ewoldt	571-272-0843	1644	REM-3C83
Jennifer Graser	571-272-0858	1645	hoteling
Adrienne Johnstone	571-272-1218	1733	REM-7B19
Christine Saoud	571-272-0891	1647	REM-4E81
Dr. Larry Tarazano	571-272-1515	1773	REM-6A69
Geraldina Visconti	571-272-1334	1752	REM-9D55

	Telephone	Art Unit	Office
Electrical Area Delegates			
Vincent Boccio	571-272-7373	2621	KNX-6D15
Azizul Choudhury	571-272-3909	2145	RND-4C65
Bill Deane	571-272-7484	2642	KNX-7D77
Albert Gagliardi	571-272-2436	2878	JEF-5C83
Kim Lockett	571-272-2067	2837	JEF-10C73
Adnan Mirza	571-272-3885	2145	RND-4A15
B. James Peikari	571-272-4185	2189	hoteling
Michael Shingleton	571-272-1770	2817	JEF-5D19
Scott J. Sugarman	571-272-2340	2873	JEF-3D11
Jeff Swearingen	571-272-3921	2145	RND-4C61
Julie Anne Watko	571-272-7597	2627	KNX-8A75
Howard Weiss	571-272-1720	2814	JEF-5A15

Mechanical Area Delegates

Ella Colbert	571-272-6741	3694	KNX-5D61
David Isabella	571-272-4749	3738	RND-6D15
Vinh Luong	571-272-7109	3682	KNX-3C03
David Reip	571-272-4702	3731	RND-6B81
David Shay	571-272-4773	3735	RND-7A75

Designs and Others

Melanie H. Tung	571-272-2613	2911	REM-5B87
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Witness Intimidation

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obtained and reviewed his badge-in/badge-out turnstile records before the interview. She then questioned Mendez's own time recording practices with questions similar to, "Can you certify that your timesheets are correct?" Ondrik also questioned Mendez about his conduct with questions like, "Could you describe any problems or issues of conduct that you had in the past?"

This investigative interview lasted approximately 2.5 hours. Ondrik also made a closing statement similar to, "I checked you out, and you're okay," referring to Mendez's time and attendance. This showed that Ondrik also obtained Mendez's 690E timesheets for comparison with the turnstile records.

In the second examiner's case, Ondrik called the examiner and demanded that the examiner meet with her that day for an interview. The examiner asked to make an appointment on another day because of prior job commitments. Ondrik then called the examiner's group director, who called the examiner to say that the interview was mandatory. This disrupted the examiner's work schedule and caused embarrassment in front of the group director and supervisor.

After setting an interview time, the examiner contacted POPA Vice President Larry Oresky to be present at the interview. With a POPA rep present, Ondrik did not question the examiner about time accounting practices. Ondrik did question the examiner about what had been said to the attorney of the examiner under criminal investigation for time fraud.

At the time of their interviews with Ondrik, neither examiner was suspected of wrongdoing. It appears the only reason for singling out these examiners for IG investigation and questioning was that they both were subpoenaed to appear as witnesses for the defense in a criminal case stemming from irregularities between a former employee's timesheets and turnstile records.

This looks like blatant intimidation of defense witnesses and misuse of official position by an agent of the U.S. government. It appears that the USPTO clearly cooperated with Ondrik's unwarranted investigation of these two employees by providing turnstile records and 690E timesheets.

POPA agrees with Mendez's suggestion, in the following letter to Director Dudas, for better training on timekeeping to avoid mistakes. This would demonstrate a concern for employee success, rather than the agency's current "gotcha" atmosphere. The same is true for the USPTO Office of General Counsel, which needs to protect the rights of agency employees.

The overzealous attention to badge-out details furthers the agency's on-site management by fear and punishment. USPTO office workers face criminal prosecution and the possibility of being subpoenaed to testify against colleagues. Employees are, in effect, punished for coming to work, while

those off site on telework or hoteling don't have that intimidation. If the USPTO is not concerned about badge-in/badge-out requirements for employees working off campus, why should it worry so about those who choose to work on campus?

POPA urges any bargaining unit member who is called to a meeting with a representative of the Inspector General's Office to contact a POPA representative immediately. ▽

An Open Letter to Director Dudas

Dear Mr. Dudas:

I am a primary examiner who was interrogated by Department of Commerce Inspector General (IG) personnel after being subpoenaed by the defense [in an ongoing criminal prosecution of a former examiner on time fraud charges].

In the pursuit of justice, the USPTO must recognize that every examiner has constitutional rights that must be respected during investigations on our premises. Clear guidelines need to be established so that all examiners in this office understand their rights and responsibilities, especially in an IG investigation.

It is very disappointing that after my almost 20 years of federal service, no department within this office cares about my rights as an employee. The USPTO General Counsel should be required to do more than just provide information about examiners to the IG. At least, the General Counsel attorneys should ensure constitutional fairness in the IG fact-finding activities instead of justifying their inaction under the false assumption that they cannot interfere with this process. Such inaction will inevitably result in the collection of tainted evidence as the courts recognize the illegalities of these activities.

Finally, based on my interrogation, this agency and the Commerce Department IG expect perfection concerning timekeeping reporting requirements. Unfortunately, this standard cannot be achieved unless the electronic security system is linked to the "timesheet" software. More importantly, the USPTO should update the April 2000 memorandum that abolished the sign-in/sign-out sheets to delineate clear disciplinary guidelines based on the perfection standard and requiring supervisors to provide yearly training about timekeeping requirements. It is presently impossible to meet the perfection standard since the security system does not provide instant and verifiable "time in/time out" data, easily accessible by each employee. To bring criminal actions against employees having time discrepancies without offering counseling, rehabilitation, and/or progressive discipline is simply abusive and will inevitably affect the productivity and retention goals of this office.

Very respectfully,
Manuel Mendez, Primary Patent Examiner